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No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. AND ANTHONY P. NUGENT, JR., JUDGES,
Petitioners,

VS.

JOHN D. ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THOMAS J. GUILFOIL
Counsel of Record
JIM J. SHOEMAKE
BRUCE DAYTON LIVINGSTON
GUILFOIL PETZALL & SHOEMAKE
100 North Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 241-6890

Attorneys for Petitioners

St. Louis Law Printing Co., Inc. 13307 Manchester Road 63131 314-231-4477

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Although respondent John D. Ashcroft, Governor of the State of Missouri, concedes both the importance of the issue and the conflict among the circuits on the question presented by petitioners with respect to the Age Discrimination in Employment Act's applicability to appointed state court judges, he insists in his Brief In Opposition that this is not an appropriate case for Supreme Court review. For the Reasons set forth in their petition and herein, petitioners, Missouri state court judges Ellis Gregory, Jr. and Anthony P. Nugent, Jr., urge this Court to grant a writ of certiorari.

First, respondent admits the existence of a conflict among the circuit courts of appeal, as well as the importance of the issue. Second, there is no reason to delay addressing the question presented, particularly given the onerous practical effect of such a delay upon effected judges. Third, contrary to respondent's Brief In Opposition, there is no independent basis for affirmance of the judgment below.

Finally, with respect to respondent's Brief In Opposition to the constitutional question presented, *i.e.*, whether the mandatory retirement only of Missouri's state court judges among all its employees in non-physically demanding jobs violates the Equal Protection Clause of the Fourteenth Amendment, petitioners reply that the only case cited by respondent is clearly distinguishable on its facts and does not resolve the conflict between the Eighth Circuit's decision in this case and prior equal protection decisions of this Court.

STATEMENT OF FACTS

Although a judge who is forced to retire under Article V, § 26 of the Missouri Constitution (the "Mandatory Retirement Provision") may be appointed as a senior judge, such appointments are entirely discretionary with the Missouri Supreme Court and are not a matter of right. The enabling statute for the appointment of senior judges provides in pertinent part that "the [Missouri] supreme court *may* appoint a senior judge from the file of approved applications," and that "[a]ppointments to serve shall be based on case load and need, as determined by the supreme court in its discretion, taking into consideration reports filed pursuant to [Mo. Rev. Stat.] § 476.412, recommendations made by the Judicial Resources Commission created herein and such other matters that the Court deems relevant." Mo. Rev. Stat. § 476.681(2) (Cum. Supp. 1989) (emphasis added).

Any Missouri judges who wish to challenge the Mandatory Retirement Provision must do so before their seventieth birthday or risk forfeiting their pension. Upon reaching the age of seventy, any judge who "fails to retire on or before his [or her] seventieth birthday shall automatically waive all such annual compensation, salary and retirement compensation." Mo. Rev. Stat. § 476.683 (Cum. Supp. 1989). The

effect of this forfeiture provision upon the willingness of Missouri state court judges to challenge the validity of the Mandatory Retirement Provision cannot be ascertained from the record; nevertheless, it should be noted that Judges Douglas W. Greene and Flake L. McHaney, plaintiffs below, retired upon reaching age seventy on March 18, 1990 and September 25, 1990, respectively. Neither pursued review in this Court.

Judges selected pursuant to the Missouri Constitutional provisions challenged herein, commonly known as the Missouri Non-Partisan Court Plan, are *appointed* to office. Mo. Const. art. V, § 25(a). Although these appointed judges stand for ***retention*** by a vote of the people, the judges are not opposed, and the question is whether they shall be "retained in office." Mo. Const. art. V, § 25(c)(1).

REASONS FOR GRANTING THE WRIT

I.

RESPONDENT ACKNOWLEDGES THE CONFLICT AMONG THE CIRCUITS AND THE IMPORTANCE OF THE ISSUE

Respondent does not deny the conflict between the Second Circuit and the Eighth and First Circuits. Brief In Opposition at 7. Respondent also acknowledges the importance of the issue by urging grant of a writ of certiorari for the conflicting Second Circuit decision. Brief In Opposition at 12 (citing *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990)). It should be noted that the state of Vermont did not seek to review the Second Circuit decision by petitioning this Court for a writ of certiorari within the time allotted under the Rules of this Court.

II.

THE EIGHTH CIRCUIT DECISION IS WRONG ON THE MERITS

Without rearguing the merits in depth, petitioners submit that appointed judges are not policymakers within the meaning of 29

U.S.C. § 630(f) and therefore not exempted from the ADEA's protection.

In its Brief In Opposition, respondent argues that Congress could not have intended for appointed judges to be "employees" under the Age Discrimination In Employment Act ("the ADEA") because that would lead to the "irrational" result of appointed judges being protected under the ADEA, while elected judges are not so protected. Brief In Opposition at 11 (quoting *Gregory v. Ashcroft*, 898 F.2d 598, 603 (8th Cir. 1990), *reprinted in* Appendix A of the Petition at A-10 to A-11). This seeming anomaly is not a result of a misapplication of the statute or a misunderstanding of Congressional intent; it is the direct result of Missouri's judicial selection system, which curiously enough provides for the appointment of some judges but for the election of others.[1] While it may seem anomalous that an elected Missouri judge and an appointed Missouri judge could be treated differently under the ADEA, the anomaly arises not from any irrationality in petitioners' reading of the statute's plain language, but instead arises from the differing methods for selecting judges under Missouri law.

Rather than re-argue whether judges are "on the policy making level," petitioners urge this Court to grant the writ of certiorari with respect to the first question presented in this case and to follow the reasoning of the Second Circuit in reaching a decision on the merits.

[1] The pertinent Missouri procedures for the selection of judges provide for the *appointment* of all appellate and certain trial judges, while they also provide for the *election* of certain other trial judges in the "out-state" areas.

III.

THE ONEROUS PRACTICAL EFFECT OF THE MANDATORY RETIREMENT PROVISION UPON MISSOURI'S STATE COURT JUDGES PROVIDES ANOTHER REASON FOR THIS COURT TO ACCEPT REVIEW OF THE ISSUE NOW, RATHER THAN DELAYING REVIEW FOR A SUBSEQUENT CASE

Another reason for granting review of the first question presented in this case is to avoid the consequences of delay — primarily upon the lives of effected state court judges in Missouri and throughout the United States, but also upon this Court's workload as an inevitably recurring issue.

Resolution of this issue with respect to Missouri state court judges is particularly important, given the onerous pension forfeiture provision extant in Missouri, Mo. Rev. Stat. § 476.683 (Cum. Supp. 1989). Two of petitioners' brethren, Judges Greene and McHaney, have already dropped out of this suit upon reaching age of seventy. Judge Nugent himself will be forced to retire on his seventieth birthday, December 6, 1990, unless a stay of the effectiveness of Section 476.683 can be obtained and thereby prevent the forfeiture of Judge Nugent's pension while this case is pending, whether on petition for writ of certiorari or on the merits. The practical effect of a delay in reviewing the applicability of the ADEA to appointed state court judges is that competent, experienced judges will be forced to retire against their will and in violation of the ADEA.

IV.

THE "ELECTED TO PUBLIC OFFICE" EXEMPTION FROM ADEA COVERAGE DOES NOT PROVIDE AN INDEPENDENT BASIS FOR AFFIRMING THE EIGHTH CIRCUIT DECISION

Respondent's contention that Missouri's appointed judges fall into the "elected to public office" exemption from the definition of "em-

ployee," 29 U.S.C. § 630(f), is incorrect and does not provide an independent basis for affirmance of the Eighth Circuit judgment.

First, if respondent is attempting to preserve this issue for review, the Eighth Circuit noted that it is not properly preserved, because the Governor did not cross-appeal and neither side briefed the issue in the Eighth Circuit. *Gregory v. Ashcroft, reprinted in* Petition at A-5. Recognizing this Court's doctrine that the prevailing party may assert in a reviewing court any ground in support of the judgment, *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970), we next address the merits to show that there is no independent basis for affirmance.[2]

Second, the plain language of the statute exempts from ADEA protection "any person elected *to* public office." 29 U.S.C. § 630(f) (emphasis added). Those Missouri judges that are selected pursuant to the Non-Partisan Court Plan, Mo. Const. art. V, § 25(a), are *appointed* to the bench, *not* elected. It is well known in Missouri, as Judge Hungate found in the district court, that all of the state's appellate judges, *e.g.*, Judge Nugent, as well as the trial judges in the major metropolitan areas, *e.g.*, Judge Gregory, are *appointed* and *not* elected to office. *See Gregory v. Ashcroft*, No. 88-0221C(3) (E.D. Mo. July 14, 1989), *reprinted in* Appendix B of the Petition at A-20 n.3.

Although appointed Missouri judges do submit to a retention referendum, they are not opposed, and the issue is not whether to elect them from among other candidates, but whether to retain them in their appointed office. *See* Mo. Const. art. V, § 25(c)(1), *reprinted in* Appendix C of the Petition at A-27 to A-28. If a judge is not retained or if a vacancy occurs for any other reason such as death or retirement, the vacancy is again filled by the Governor through *appointment* of a replacement. Mo. Const. art. V, § 25(c)(1); *id.* § 25(a).

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[2] Under the line of cases cited in *Dandridge* and in light of the parties' failure to even brief the issue in the Eighth Circuit, petitioners suggest that the more appropriate course of action would be to address the policymaking exemption in this Court, and if necessary address the "elected to public office" exemption on remand. *See Dandridge*, 397 U.S. at 475 n.6; *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 468 (1947).

Under these circumstances, Missouri judges that are appointed pursuant to the Non-Partisan Court Plan cannot be said to be "elected to public office" within the meaning of that term in the ADEA.

V.

RESPONDENT FAILED TO DISCUSS OR REBUT PETITIONERS' CONTENTION THAT THE EIGHTH CIRCUIT'S RATIONAL BASIS ANALYSIS IS IN CONFLICT WITH THIS COURT'S EQUAL PROTECTION DECISIONS

By addressing the level of constitutional scrutiny to which the classification of the aged is entitled, respondent offered a "red herring" and failed to address the constitutional error alleged by petitioners. Petitioners did not argue that they were entitled to heightened scrutiny. Petitioners argued instead that the decision below cannot stand under traditional rational basis analysis and this Court's decisions in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

In their petition, petitioners argued that three of the four legislative purposes, allegedly advanced by the Mandatory Retirement Provision and relied upon by respondent and the courts below as being rationally based, were facially invalid under *Cleburne*. Petition at 14. Respondent failed to even address that contention.

Instead, respondent's Brief in Opposition focused upon the fourth purpose that allegedly provides another rational basis for upholding the Mandatory Retirement Provision, *i.e.*, Missouri's interest "in maintaining a highly qualified and vigorous state judiciary" by drawing "a line at an age at which there is often a lessening in mental and physical abilities." See Petition at 14 (quoting the decision below, reprinted in Appendix at A-15). Petitioners asserted that if the Mandatory Retirement Provision excluded from service so few judges who were in fact unqualified, then under *Murgia* the retirement age of seventy would be wholly unrelated to the object of the statute and therefore irrational and unconstitutional. Petition at 14-15. Accordingly, petitioners argued that the district court was premature in

dismissing petitioners' complaint without allowing the presentation of any evidence to show the rational basis for the state's selection of age seventy as the age at which a constitutionally significant number of judges decline in their mental and physical ability to perform their duties. Petitioners therefore contended that they were entitled to an evidentiary hearing, at which they could have attempted to prove the irrationality of the state's selection of an age seventy retirement date.

Respondent contends that as a matter of law and apparently in all cases, an evidentiary hearing is not required to sustain a motion to dismiss. Brief In Opposition at 16 (citing as support this Court's decision in *Pennell v. City of San Jose*, 481 U.S. 1, 108 S.Ct. 849 (1988)). While an evidentiary hearing may not have been required in *Pennell*, respondent is incorrect in his contention that an evidentiary hearing is not required as a means of showing the rationality of the age seventy retirement date with respect to the state's avowed purpose of assuring a vigorous and healthy judiciary.

Pennell is clearly distinguishable from the case at bar. *Pennell* involved a rent control statute that the petitioner contended was facially invalid. 481 U.S. at ___, 108 S.Ct. at 857. The statute itself, however, required a particularly detailed factual finding by a hearing officer before allowing an additional rent increase over and above certain amounts that were deemed reasonable under the statute. Under those circumstances and in light of such detailed factual findings, this Court had no difficulty in holding that such a statute, "which so carefully considers both the individual circumstances of the landlord and tenant . . . does not on its face violate the Fourteenth Amendment's Due Process Clause." *Id.* at ___, 108 S.Ct. at 858-59.

In contrast to the detailed factual findings required by the statute in *Pennell*, the Mandatory Retirement Provision and the Eighth Circuit decision below required no factual finding of any kind to establish the rational basis of Missouri's Mandatory Retirement Provision. This Court upheld a mandatory retirement provision in *Murgia*, but only after extensive evidence had been presented and only after petitioners had failed to show that the retirement age selected was "wholly unrelated" to the state's objective in insuring the "physical prepared-

ness" of its police. *Murgia*, 427 U.S. at 314-16. With respect to Missouri's alleged purpose in maintaining a "vigorous state judiciary" by arbitrarily selecting an age at which there may (or may not) be a decline in mental and physical abilities, a similar factual inquiry should be required.

Given Missouri's inability to establish a rational basis for selecting judges as the only persons subject to a mandatory retirement policy among all state employees in non-physically demanding jobs, this Court should grant petitioners' second question presented in their petition for a writ of certiorari and address the constitutionality of the Mandatory Retirement Provision as applied to all judges in the state of Missouri, whether appointed or elected.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

DATED this 12th day of November, 1990.

Respectfully submitted,
Thomas J. Guilfoil

Counsel of Record
Jim J. Shoemake
Bruce Dayton Livingston
Guilfoil Petzall & Shoemake
100 North Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 241-6890
Attorneys for Petitioners